Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re:	:	**MDL Docket No. 4:03CV1507 WRW**
	:	
PREMPRO PRODUCTS LIABILITY LITIGATION	:	***Scroggin v. Wyeth, et al.*** **Case No. 4:04-CV-1169 WRW**

PLAINTIFF'S RESPONSES TO DEFENDANT WYETH'S FIRST SET OF INTERROGATORIES

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Wyeth propounds the interrogatories set forth below. Plaintiff is required to answer each interrogatory separately and fully in writing, under oath, and to serve a copy of her answers, within thirty (30) days of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. In answering these interrogatories, plaintiff is requested to furnish such information as is available to her, or in the possession of her agents and representatives, including attorneys and investigators. Whenever the term "you," "your" or "yourself" is used, it refers to the plaintiff and her agents and representatives.

Objection

1. **Plaintiff objects to this definition because it would broaden the requests to invade privilege.**

   Namely, the attorney-client and work product privileges. The definition would make the requests encompass communications protected by the attorney-client privilege and counsel's mental thoughts and processes, protected by the work product privilege.

2. The term "document(s)" has the meaning set forth in FED. R. CIV. P. 34(a) and refers to every original, draft, and duplicate of every writing and recording of every

type and description, including, but not limited to, all writings, recordings, electronic or magnetic recordings or transmissions of information, and photographs, and all documents or tangible things, including all writings, drawings, graphs, charts, papers, books, accounts, photographs of any kind (including but not limited to prints, microfilm, imaging, slides or negatives), tape recordings, video cassettes, and other data compilations from which information can be obtained, including originals and nonidentical copies thereof, that are in your possession, custody, or control, whether actual or constructive, or of which you have knowledge, including without limitation: writing, papers, publications, books, documents, records, forms, photographs, tangible things, letters, correspondence, intra- or interoffice communications, telegrams, cables, telex messages, memoranda, notes, notations, drafts, work papers, transcripts, minutes, stenographic or handwritten notes, reports, recordings of telephone or other conversations (including telephone bills), interviews, conferences or other meetings, affidavits, statements, summaries, opinions, investigative reports, daily reports, calendars, studies, analyses, evaluations, announcements, advertisements, instructions, charts, diagrams, pictures, manuals, brochures, pamphlets, schedules, price lists, client lists, statistical records, lists, tabulations, programs, computer data, computer text files, electronic mail, data processing input and output, microfilm, releases, contracts, agreements, ledgers, accounts, books of account, checks, receipts, records and invoices reflecting business operations, all records kept by electronic, photographic or mechanical means, and all things similar to any of the foregoing, however described. The term also includes other data compilations from which information can be obtained and translated if necessary, by you through detection devices into reasonably usable form.

Objection

1. **Plaintiff objects to this definition as overly broad, unduly burdensome and exceeding the scope of permissible discovery.**

The definition begins by stating the term "documents" will be defined as it is defined in Rule 34(a). The definition then goes on to provide a definition far beyond what that rule provides. By way of example only, the last sentence of the definition could arguably be interpreted to require Plaintiff to generate documents that do not yet exist -- something that exceeds the scope of permissible discovery. As another example, the request includes "client lists" which, particularly in light of Definition No. 1 would invade attorney-client privilege. Plaintiff's responses below are based on the definition of documents contained in the federal rule.

3. The term "correspondence" refers to every original, draft, and duplicate of any letters, facsimiles, electronic mail, handwritten notes, intra- or interoffice communications, telegrams, cables, telex messages, recordings of telephone or other conversations, and all things similar to any of the foregoing, however described.

4. If you are completing these interrogatories and requests in a representative capacity, please respond with respect to the person who used the Hormone Therapy ("HT") medications. Those questions using the term "you" refer to the person who used the HT medications and the agents and representatives of that person. If the individual is deceased, please respond as of the time immediately prior to his or her death unless a different time period is specified.

5. "Identify" or "identity," when used in reference to a natural person, means to state the person's full name, present or last known address, present or last known telephone number, and relationship, if any, to you.

Objections

1. **This definition exceeds the scope of permissible discovery.**

At most, Plaintiff is required to provide name, address and telephone number, not "relationship to plaintiff."

2. **This definition is so vague that one would have to guess as to its meaning.**

"Relationship" to plaintiff is undefined. Does it encompass social, economic, litigation or ideological-sharing relationships?

3. **This definition invades attorney-client privilege, invades Plaintiff's privacy expectations and is not reasonably calculated to lead to the discovery of admissible evidence.**

At least, it could, depending upon the meaning of the term "relationship." Without knowing that definition, Plaintiff does not know.

6. "Identify" or "identity," when used in reference to a document, means to state its type (*e.g.*, letter, facsimile, memorandum, sales receipt), subject matter, and date, and the identity of each author, addressee, and recipient.

Objections

1. **This definition is overly broad and unduly burdensome.**

It calls for the provision of such detailed information about each document which would be unduly burdensome to provide.

7. "Identify" or "identity," when used in reference to a place of business or education institution, means to state its name, street address, and phone number.

8. The term "communication(s)" means every manner or means of disclosure, representation or warranty, transfer or exchange, and every disclosure, transfer, or exchange of information, whether made or accomplished orally, by physical action, or by document, whether face to face, over the telephone or modem, electronically, by mail, by courier, personal delivery, or otherwise.

Objections

1. **This definition is overly broad, unduly burdensome and exceeds the scope of permissible discovery.**

It would require Plaintiff to recall or investigate every conversation or communication ever made.

9. "Person" includes any natural person, firm, association, partnership, trust, corporation, or government entity.

10. Whenever the term "Hormone Therapy" or "HT" is used, that term includes Prempro, Premarin, Premphase, and Cycrin, as well as any other product intended to compensate for loss of estrogen associated with menopause or to alleviate symptoms associated with menopause, whether prescription, herbal, or over-the-counter.

11. If you cannot answer the foregoing interrogatories in full and complete detail after exercising due diligence to secure the information to do so, please so state and answer to the extent possible, specifying in each instance your inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portions.

Objection

1. **This request is overly broad and exceeds the scope of permissible discovery.**

Plaintiff is required only to provide the information she possesses. She is not required to speculate about what information she may not possess.

12. Pursuant to FED. R. CIV. P. 26(e), you are required to supplement your responses to these interrogatories if you acquire responsive information after serving your initial answers. If you fail to do so, you may be precluded at trial from introducing evidence relating to the subject matter of these interrogatories.

Objection

1. **Plaintiff objects to the self-serving language regarding the effect of their answers.**

The Court will decide the effect of Plaintiff's answers or purported lack thereof, not Wyeth.

INTERROGATORIES

INTERROGATORY NO. 1:

Do you contend that Dr. Kuperman was negligent in prescribing hormone therapy to Ms. Scroggin in any year from 1989 to 2000?

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Provides no definition for the word "negligence" and whether such meaning refers to medical malpractice or common law wrongful conduct. Plaintiff is clearly not qualified to answer a question concerning a medical doctor's negligence.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: Plaintiff does not assert that Dr. Kuperman was negligent in prescribing hormone therapy to Ms. Scroggin since Dr. Kuperman believed Defendants' representations that these drugs had been fully tested, that these drugs were safe for long-term use and that combination hormone therapy had minimal or no significant risks. Further, Plaintiff believes that Dr. Kuperman trusted Defendants to conduct adequate testing of its hormone therapy drugs and to convey complete and accurate risk information to him. Dr. Kuperman cannot, and should not, be blamed for Defendants' wrongful conduct.

INTERROGATORY NO. 2:

Do you contend that Dr. Kuperman was negligent in advising Ms. Scroggin about the risks and/or benefits of hormone therapy? If so, state what Dr. Kuperman should have told Ms. Scroggin (at her office visit[s] for each of the years listed below) about the risks of hormone therapy:

(a) in 1989;
(b) in 1990;
(c) in 1991;
(d) in 1992;
(e) in 1993;
(f) in 1994;
(g) in 1995;
(h) in 1996;
(i) in 1997;
(j) in 1998;
(k) in 1999;
(l) in 2000.

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Provides no definition for the word "negligence" and whether such meaning refers to medical malpractice or common law wrongful conduct. Plaintiff is clearly not qualified to answer a question concerning a medical doctor's negligence.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: Defendants misrepresented the risks and benefits of its hormone therapy drugs to prescribing physicians. Dr. Kuperman cannot pass along to his patients risk or benefit information that was not provided to him by Defendants. Dr. Kuperman cannot, and should not, be blamed for Defendants' wrongful conduct.

INTERROGATORY NO. 3:

State whether you contend Premarin was (or is) defectively designed.

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Provides no definition for the word "defectively designed". Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: See Plaintiff's complaint in this matter. Yes, Plaintiff has made a claim that Wyeth's hormone therapy products, including Premarin when used in conjunction with Medroxyprogesterone Acetate, are defectively designed as they were promoted for use by Defendants.

INTERROGATORY NO. 4:

State whether you contend Prempro was (or is) defectively designed.

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Provides no definition for the word "defectively designed". Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: See Plaintiff's complaint in this matter. Yes, Plaintiff has made a claim that Wyeth's hormone therapy products, including Premarin when used in conjunction with Medroxyprogesterone Acetate, are defectively designed as they were promoted for use by Defendants.

INTERROGATORY NO. 5:

State whether the Prempro label failed adequately to warn about the risk of breast cancer in:

(a) 1995?
(b) 1996?
(c) 1997?
(d) 1998?
(e) 1999?
(f) 2000?
(g) 2001?
(h) 2002?

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Provides no definition for the word "failed adequately to warn". Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: See Plaintiff's complaint in this matter. Yes, Plaintiff has made a claim that Wyeth failed to adequately warn about the risk of breast cancer in Prempro's label throughout the time that Ms. Scroggin used that product and up until the time that the label was changed following the release of the WHI study results.

INTERROGATORY NO. 6:

State whether you contend that low dose Prempro (either 0.3 mg/1.5 mg or .45 mg/1.5 mg Prempro) is a safer alternative design to 0.625 mg/2.5 mg Prempro.

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Provides no definition for the word "safer alternative design". Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: Yes.

INTERROGATORY NO. 7:

State whether you contend the Food and Drug Administration at any time should have withdrawn, or taken steps to withdraw, Premarin from the market. If so, when?

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: No.

INTERROGATORY NO. 8:

State whether you contend the Food and Drug Administration at any time should have withdrawn, or taken steps to withdraw, Prempro from the market. If so, when?

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: No.

INTERROGATORY NO. 9:

State whether you contend Wyeth should at any time have withdrawn, or taken steps to withdraw, Premarin from the market. If so, when?

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: This question does not take into account any of the information that accompanies a prescription drug product such as dose, duration, warnings or indications. Plaintiff asserts that "Old Premarin" has been removed from the market by Wyeth and replaced with "New Premarin" which is detailed and described in the current Premarin label.

INTERROGATORY NO. 10:

State whether you contend Wyeth at any time should have withdrawn, or taken steps to withdraw, Prempro from the market. If so, when?

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: This question does not take into account any of the information that accompanies a prescription drug product such as dose, duration, warnings or indications. Plaintiff asserts that "Old Prempro" has been removed from the market by Wyeth and replaced with "New Low Dose Prempro" which is detailed and described in the current Prempro label.

INTERROGATORY NO. 11:

Identify any and all lawsuits and/or legal proceedings to which you have been a party, including: (a) the case name; (b) the case number; (c) the jurisdiction in which the case

was filed; (d) whether you were the plaintiff or defendant; (d) the nature of the claims made by or against you; and (e) the outcome of the case.

ANSWER: Plaintiff was involved in a car accident in the early 1990s and sued the defendant for injuries sustained to her back. Her case was filed in Little Rock, Arkansas and she was represented by Peter Miller. The case ended in settlement. Plaintiff does not recall the name, number, or jurisdiction associated with the case.

INTERROGATORY NO. 12:

Identify which, if any, specific picture(s) of yourself that you intend to show the jury at trial in light of Judge Wilson's caution that any picture "slide shows" should be significantly pared down from the one used by counsel at the *Reeves* trial.

ANSWER: Neither the Plaintiff nor her counsel has any idea what "caution" this question refers to. Plaintiff has already provided copies of photographs that she intends to use at the trial of this matter either during her testimony, the testimony of fact witnesses or to respond to issues raised by defendants in this case.

INTERROGATORY NO. 13:

Identify any physicians you have seen or been examined by since your deposition on October 21, 2005.

ANSWER: Plaintiff has been seen or examined by the following physicians since her deposition:

Marriann Harrington, M.D., 9500 Lile Dr., Little Rock AR 72205 (501) 664-4820

Cynthia Frazier, M.D., 500 S. University Ave., Suite 709, Little Rock, AR 72205 (501) 663-5055

Jerry Carter, M.D., 11719 Hinson Rd., Suite 110, Little Rock, AR 72212 (501) 224-2875

Timothy Boehm, M.D., 10001 Lile Drive, Little Rock, AR 72205 (501) 227-8000

Ronald Hardin, M.D., 9501 Lile Drive, Little Rock, AR 72205 (501) 224-9100

David Smith, M.D., 10100 Kanis Rd., Little Rock, AR 72205 (501) 255-6000

Kent McElvey, Jr., M.D., 521 Jack Stephens Dr., Suite 530, Little Rock, AR 72205 (501) 686-6564

Jay Flaming, M.D., 500 S. University Ave., # 301, Little Rock, AR 72205 (501) 664-4161

INTERROGATORY NO. 14:

Identify any medical conditions or problems that have developed and/or been diagnosed since your deposition on October 21, 2005.

ANSWER: Plaintiff has not developed or been diagnosed with any medical conditions or problems since her deposition.

INTERROGATORY NO. 15:

Regarding paragraph 79(e) of plaintiff's complaint filed on October 8, 2004 ("the Complaint"), for each year that plaintiff used Premarin or Prempro, state what the "proper warnings regarding all possible adverse side effects associated with the use of such products and the comparative severity and duration of such adverse effects" should have said.

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: See the expert reports, depositions and trial testimony of Plaintiff's experts for details about Plaintiff's failure to warn claim and the specifics of what information should have been contained in the label. In summary, Plaintiff asserts that if Defendants had conducted adequate testing, then for each year of hormone therapy use by the Plaintiff, Premarin and Prempro breast cancer warnings would have been in a black box and would have contained clear and definitive information about the connection between hormone therapy drugs and breast cancer. For details of what warnings would have been appropriate, see for example paragraphs 185-260 of Dr. Gueriguian's expert report dated February 15, 2006.

INTERROGATORY NO. 16:

Regarding paragraph 80 of the Complaint, state what "safer and more effective methods of countering any health effects of menopause were available."

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows:

The following safe alternatives were (or could have been) available for the Plaintiff to use: bioidentical hormones or low dose combination hormone therapy.

INTERROGATORY NO. 17:

Regarding paragraph 82 of the Complaint, identify by date and source the "false and misleading information with regard to the safety and efficacy of the products" Wyeth provided.

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: See the expert reports, depositions and trial testimony of Plaintiff's experts for details about Plaintiff's negligence and misrepresentation claims.

INTERROGATORY NO. 18:

Regarding paragraph 107 of the Complaint, identify by date and source each statement by which Wyeth "expressly warranted to the FDA, prescribing physicians, and the general public, including the Plaintiff, that their hormone therapy products were both efficacious and safe for the intended use."

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: See the expert reports, depositions and trial testimony of Plaintiff's experts for details about Plaintiff's claims based upon Wyeth's representations to the FDA, prescribing physicians and patients, including the Plaintiff.

INTERROGATORY NO. 19:

Regarding paragraph 114 of the Complaint, identify by date and source each statement by which Wyeth "impliedly warranted the product to be of merchantable quality and safe and fit for its intended use."

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows:

See the expert reports, depositions and trial testimony of Plaintiff's experts for details about Plaintiff's claims based upon Wyeth's implied representations about combination hormone therapy.

INTERROGATORY NO. 20:

Regarding Count VII of the Complaint, identify by date and source each of the intentional misrepresentations that Wyeth made to plaintiff and/or her prescribing physician(s).

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: Discovery is not completed in this case and so Plaintiff cannot answer this question. However, see the Plaintiff's deposition as well as expert reports, depositions and trial testimony of Plaintiff's experts for details about Plaintiff's claims based upon Wyeth's intentional misrepresentations or fraud.

INTERROGATORY NO. 21:

Regarding Count VII of the Complaint, identify by date and source each of the intentional misrepresentations made by Wyeth upon which plaintiff and/or her prescribers relied.

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: Discovery is not completed in this case and so Plaintiff cannot answer this question. However, see the Plaintiff's deposition as well as expert reports, depositions and trial testimony of Plaintiff's experts for details about Plaintiff's claims based upon Wyeth's intentional misrepresentations or fraud.

INTERROGATORY NO. 22:

Regarding paragraph 123 of the Complaint, identify the "false and misleading information" that Wyeth provided "to the FDA to support inaccurate risk and benefit information contained in the product labeling."

ANSWER: Objection. Relevance. Vague. Overbroad. Calls for a legal conclusion. Plaintiff is clearly not qualified to answer this legal question.

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows:

See the expert reports, depositions and trial testimony of Plaintiff's experts for details about Plaintiff's claims based upon Wyeth's misrepresentations about the risk and benefit of its products.

INTERROGATORY NO. 23:

State whether you contend that the following labels failed adequately to warn of the risk of breast cancer:

(a) 2003 (attached as Ex. 1)?
(b) 2004 (attached as Ex. 2)?
(c) 2005 (attached as Ex. 3)?
(d) 2006 (attached as Ex. 4)?
(e) 2007 (attached as Ex. 5)?

ANSWER: Objection, vague, ambiguous, no definition for the phrase "adequately warn."

Subject to these objections, Plaintiff's counsel answers this interrogatory as follows: Plaintiff states that the identified labels provide clear, definitive warnings about the risk of breast cancer from Prempro including a black box warning. As discussed by both Dr. Gueriguian and Dr. Blume in their trial testimony, such labels do not contain any warnings about increased breast cancer risk to subgroup populations. Further, the 2007 Prempro label does not include information about the new SEER data which was published after the approval of the 2007 Prempro label. Plaintiff anticipates that once the FDA has been provided that data to review, the 2008 Prempro label will provide even more detailed information to physicians and doctors about the clear link between hormone therapy and breast cancer.

Dated this 19th day of July, 2007.

LITTLEPAGE BOOTH

Zoe B. Littlepage
SBOT# 12430050; Federal Bar #12896
1012 W. Alabama St.
Houston, Texas 77006
(713) 529-8000 – Telephone
(713) 529-8044 – Facsimile

CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of July, 2007, a true and correct copy of the foregoing document was forwarded by e-mail to the parties below:

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Zoe B. Littlepage

Exhibit 2

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR WASHOE COUNTY

ARLENE ROWATT, PAMELA FORRESTER and JERALDINE SCOFIELD,	)	CASE NO. CV04-01699
Plaintiffs,	)	DEPT NO. 9
v.	)	
WYETH and PHARMACIA & UPJOHN COMPANY, LLC	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re: PREMPRO PRODUCTS LIABILITY LITIGATION	)	MDL DOCKET NO. 4:03CV1507WRW

CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

- - -

July 20th, 2007

- - -

SUZANNE PARISIAN, M.D. (VOLUME 2)

- - -

GOLKOW TECHNOLOGIES, INC.
One Liberty Place, 51st Floor, 1650 Market St.
Philadelphia, PA 19103
877.370.3377

have a duty, once you've started promoting a product for a new indication, which would be prolonged use, to determine the safety and effectiveness, that's without the FDA, and to warn.

So those are not necessarily the FDA, that would just be in terms of conduct of other pharmaceutical manufacturers.

You don't market a product without ensuring that it remains safe and effective and adequately labeled, that the physician has the adequate information. That's without the FDA.

Q. So that -- if I understood your terminology correct, that is an industry standard that isn't written down anywhere. I can't go and look at it and say, "Okay, this is the standard. This is what it says the company is supposed to do," correct?

A. Correct. That's just responsible conduct.

Q. And that is -- you'll agree, that is a subjective judgment that each

company has to make on its own as to what that standard is and how it chooses to meet it, correct?

A. Yes, but the key that you said is that each company does make that determination, because it is the ethical conduct of a manufacturer.

Q. And you are --

A. So they have to do it themselves.

Q. And you are offering your subjective opinion as to whether or not Wyeth met or did not meet that subjective industry standard, correct?

A. Correct. It's not a written-down standard. It's just a code of ethics in terms of not hurting people with -- it's bad business to hurt people.

Q. Let's go back to the things that are written down. So we've talked about the Food, Drug and Cosmetic Act. Let's talk about now the Code of Federal Regulation for Premarin.

Are there any specific

Exhibit 3

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION	MDL DOCKET NO. 4:03CV1507 WRW Reeves v. Wyeth Case No. 4:05-cv-00163-WRW
IN RE: PREMPRO PRODUCTS LIABILITY LITIGATION	Rush v Wyeth, et al. Case No. 4:05-cv-00497-WRW
IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Banks, et al. v. Wyeth, et al. June Term 2004 No. 000420 Coleman, et al. v. Wyeth, et al. June Term 2004 No. 003179 Daniel, et al. v. Wyeth, et al. June Term 2004 No. 002368
IN RE: HORMONE THERAPY CASE	Dockter, et al. v. Wyeth et al., January Term 2004 No. 003761

C O N F I D E N T I A L
SUBJECT TO PROTECTIVE ORDER

April 7, 2006

Videotape deposition of
CHERYL D. BLUME, Ph.D.

GOLKOW LITIGATION TECHNOLOGIES
Four Penn Center
1600 John F. Kennedy Boulevard
Suite 1210
Philadelphia, Pennsylvania 19103
877.DEPS.USA

that given it's their product. And FDA said, no, it's too high of a risk, and they are aware of other data that is coming from a foreign regulatory authority. So, despite the best intentions of my client, the FDA said no.

Q. Where is the standard written that a reasonable pharmaceutical company in Wyeth's position would have done a WHI study earlier?

A. FDA requires that companies conduct pharmacovigilance studies, pharmacovigilance assessments. And if pharmacovigilance data indicates that there is a new event or a change in event or something new about the drug, or something unknown about the drug but is of critical value, critical importance in the patients that you are selling your product to, then you must follow up on that pharmacovigilance.

Now, there is nowhere in FDA law that says -- defines exactly the type of study you must do. It says you will

conduct pharmacovigilance, and you will follow up on pharmacovigilance. The standard in the industry is when one has a pharmacovigilance signal, they are expected to follow up on that signal, be it with study design, patient restrictions, removal of a product, restrictions of certain doses, whatever. But there is no set standard. Every company has to do what is appropriate for their product. Obviously, combination estrogen products aren't handled in the same way as a product that causes, you know, rare skin reactions. So, every company has the same mandate, but there are no specific requirements because it varies by the product.

Q. Let me ask you a different question.

Would you be willing to defer to the FDA on whether a WHI-like study should have been conducted earlier?

A. I don't know what you mean.

Q. Would you be willing to

Exhibit 4

NDA 20-303
Conjugated Estrogens Tablets and
Medroxyprogesterone Acetate Tablets
Wyeth-Ayerst Laboratories

Summary Basis of Approval

Clinical

March 2, 1993
December 30, 1994

Chemistry

December 22, 1994

Pharmacology

June 7, 1993

Biopharmaceutics

December 23, 1994

Statistics

August 15, 1994
July 15, 1994
December 23, 1994

cc:
Arch NDa
HFD-510/CKish
HFD-19

DEC 30 1994

Medical Officer's Review of Original and Resubmitted NDA Submissions

NDA #	20 303	Original submission date:	12/22/92
MOR #	2	Resubmission date:	12/30/93
Sponsor:	Wyeth Ayerst Laboratories	Date Review completed:	12/29/94

1. *General Information*

Name of drug

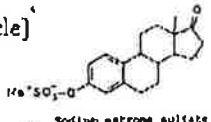
Generic names: Conjugated estrogens (Estrone sulfate and Equilin sulfate) and Medroxyprogesterone acetate (MPA)

Proposed trade names: PREMPRO® [continuous combined regimen (Regimens "A" and "B"): daily Premarin® conjugated estrogens and Cycrin® MPA]

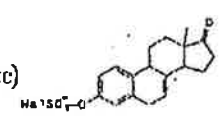
PREMPHASE® [continuous sequential regimen (Regimen "C"): daily Premarin® with MPA days 15-28 of each 28 day cycle]

Chemical names and structures:

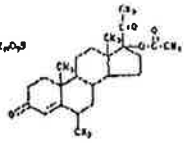
3-Hydroxyestra-1,3,5(10)-trien-17-one 3-sulfate (Estrone sulfate)



3-Hydroxyestra-1,2,5(10),7-tetraen-17-one 3-sulfate (Equilin sulfate)



(6-α)-17-Hydroxy-6-methylpregn-4-ene-3,20-dione 17-acetate (MPA)



Pharmacologic Category: Fixed combination oral estrogen and oral progestin

Proposed Indications: In women with an intact uterus:

1. Treatment of moderate to severe vasomotor symptoms associated with the menopause.
2. Treatment of vulvar and vaginal atrophy.
3. Prevention of osteoporosis.

Dosage Form and Route of Administration:

Separate oral tablets of Premarin® and Cycrin® in combined blister packaging:

Premarin 0.625 mg/Cycrin 2.5 mg for concomitant daily administration (Regimen "A");
Premarin 0.625 mg/Cycrin 5.0 mg for concomitant daily administration (Regimen "B");
Premarin 0.625 mg for daily administration/Cycrin 5.0 mg for concomitant administration days 15-28 of each 28 day cycle (Regimen "C").

NDA Drug Classification: 4S

Related Drugs:

Conjugated estrogens (vaginal cream; injectable); Esterified estrogens (oral); Estrone (injectable); Estropipate (oral, vaginal cream); 17β-Estradiol (micronized oral, transdermal; vaginal cream; injectable); Ethinyl estradiol (oral); Progesterone (injectable and contraceptive IUD); Hydroxyprogesterone caproate (injectable); Medroxyprogesterone acetate (oral, injectable). [Unapproved progestins: Progesterone (micronized oral), Dydrogesterone (oral).]

Related Reviews: Statistical Review dated 12/23/94; Biopharm Review dated 12/23/94; Memo of Consultation from Dr. B.V. Stadel, Epidemiologist, dated 12/29/94.

2. *Table of Contents*

3. *Material Reviewed*

Volume 1.1 (Application Summary and Index; Refusal to file action letter, February 19, 1993);
Volumes 1.29-1.57 (Clinical section of original submission);
Volumes 1.78-1.166 (Case Report Tabulations) and 1.167-1.174 (Case Report Forms);
Volume 1.1A (Sponsor's response to Refusal to file letter, March 11 and September 27, 1993);
Volume 2.1 (Amendment 1: Resubmission: Table of Contents, December 30, 1993);
Volumes 2.46-2.58 (Case Report Tabulations)
Volume 3.1 (Sponsor's pre-meeting package with protocol synopsis: "A Prospective, Double-Blind, Randomized Study of Safety/Efficacy of Premarin/MPA in Postmenopausal Women", January 13, 1994;
Replacement disks for virus-infected Biopharm data disks, January 24, 1994;
Minutes of February 14, 1994, 45-day meeting of Resubmission;
Sponsor's response to DMEDP request for re-reading of endometrial biopsies, 3/29/94;
Sponsor's request for clearance of trade names, May 16, 1994, amended June 10, 1994;
Letter to sponsor confirming revised request for re-reading of 10% sample of endometrial biopsies, July 11, 1994);
Volume 5.1 (Amendment 3: Report Comparing Endometrial Biopsy Results of Two Independent Pathologists: Wyeth Ayerst Study 713B-300, -301, August 10, 1994);
Volume 7.1 (Amendment 4: Application Summary and Revised Labeling Text, September 30, 1994);
Volume 8.1 (Additional Case Report Forms, October 24, 1994);
Volume 9.1 (Amendment 5: Safety Update Report, November 29, 1994);
Amendment 6: Response to FDA Requests: Clinical, November 30, 1994);
(Amendment 8: Response to FDA Requests: Clinical, December 15, 1994).

4. *Chemistry/Manufacturing Controls*

Please refer to the Chemistry Review. The following chemistry issues are noteworthy:

The Premarin® tablet formulation studied in the pivotal clinical trial differs from marketed Premarin® by removal of talc triturate and rubidium bromide from its core. Because of this formulation change, the extended release characteristics of the Premarin tablet (related to both core and coating composition), and the extensive clinical usage of this drug, the sponsor was required to submit in-vivo bioequivalence data to demonstrate that the new and currently marketed formulations are bioequivalent (see Biopharm Review).

The proposed labeling of the blister card packaging for PREMPHASE® is unacceptable because the print size on "Card 2" containing the "Directions for Use" is too small to be adequately legible by the elderly target population for this drug. The sponsor believes this is a short term problem based on their recent submission of NDA #20-527 (filing date 1/17/95) for combination tablets containing both Premarin/MPA. If approval is received for NDA #20-527, the sponsor proposes as a permanent solution to replace the separate Premarin® and Cycrin® tablets in NDA #20-303 with combination tablets containing both Premarin and MPA; since the combination tablets take up less

space than the 2 tablets now packaged together, more space would be available on the blister card for larger printed "Directions for Use". As an interim solution, they propose to include duplicate "Directions for Use" in large print on the outside of the box holding the blister cards. In response to this reviewer's request, they have agreed to include additional notations on the box stating "Save Box for Directions for Use" (to the patient) and "Place Prescription Label Here" (to alert the pharmacist not to occlude the "Directions for Use" with the Rx label). This solution is acceptable provided the sponsor also agrees to correct the print size directly on the blister cards (either by replacing the separate Premarin and MPA tablets with a combination tablet or by modifying the blister card configuration to accommodate all tablets with legible "Directions for Use") within one calendar year following approval of NDA #20-303.

5. *Animal Pharmacology/Toxicology*

Please refer to the Pharmacology Review. MPA was reported *carcinogenic by the oral route in rats* in a 2-year oral carcinogenicity study of Cycrin® MPA, conducted by the sponsor in support of this NDA (refer to Statistical Review and Consultation dated 7/15/94, appended to Pharmacology review #001, confirming the sponsor's finding). Treated rats developed islet cell hyperplasia, adenomas, and carcinomas in a dose-dependent manner, some with liver metastases, at doses approximately 25 times the human dose of 10 mg/day. Immunohistochemical studies of the proliferative pancreatic islets showed staining similar to normal islets, primarily for insulin with some variable staining for glucagon and somatostatin. Plasma glucose levels were decreased in the rats treated with MPA but circulating insulin levels were not determined. The sponsor "believe[s] this finding to be unique to rats given the sensitivity of their endocrine system to hormone imbalance" (NDA vol 1.1, p 264). They suggest that the pancreatic tumors were due to high MPA levels cross-reacting with glucocorticoid receptors to provoke hyperglycemia, which overstimulated the pancreatic islets to overgrow and transform. If this hypothesis is potentially applicable to human physiology, it emphasizes the importance of minimizing MPA dosage levels to maximize the safety of chronic administration to women. However, this reviewer is aware of no conclusive clinical evidence linking glucose intolerance or insulin deficiency diabetes mellitus as a risk factor to the development of islet cell tumors or pancreatic carcinoma in humans (Warshaw, 1992).

6. *Clinical Background*

PREMARIN TABLETS: In 1942, NDA #4-782 for Premarin® Conjugated Estrogens Tablets became effective based on a satisfactory safety review, under the original Food, Drug, and Cosmetic Act of 1938 (the Act).

In 1972, following a post-marketing efficacy review by the National Academy of Sciences National Research Council (NAS-NRC) under the Drug Efficacy Study (DESI), FDA initially classified certain estrogens including Premarin® Tablets as "effective" for a number of symptomatic indications and "probably effective" in selected cases of osteoporosis (DESI 1543; 37 FR 14826-9, July 25, 1972). A follow-up notice (DESI 1543; 41 FR 43114, September 29, 1976) defined the

conditions for marketing estrogens for their effective indications, reclassified all less-than-effective indications as "lacking substantial evidence of effectiveness", and published labeling requirements for the effective indications (as amended October 29, 1976; 41 FR 47573-8):

Moderate to severe vasomotor symptoms associated with the menopause
(There is no evidence that estrogens are effective for nervous symptoms or depression which might occur during menopause and they should not be used to treat these conditions).
Female hypogonadism; Female castration; Primary ovarian failure.
Atrophic vaginitis, kraurosis vulvae.
Postpartum breast engorgement...
Prostatic carcinoma – palliative therapy of advanced disease.
Breast cancer (for palliation only) in appropriately selected women and men with metastatic disease.

The notice specifically excepted Premarin Tablets labeled for osteoporosis from reclassification as "lacking substantial evidence of effectiveness", stating that only Ayerst Laboratories had submitted data to support upgrading the indication to "effective" but that Ayerst's submission was found not to provide substantial evidence of Premarin's effectiveness, and that a future notice would specifically explain this conclusion. This action allowed Premarin Tablets to carry the "probably effective" indication for osteoporosis.

In 1986, based on the recommendations of two advisory committees (Endocrine and Metabolism, February 18, 1977; Obstetrics and Gynecology, July 28, 1977) and additional published literature, including clinical dose-ranging data using bone mineral density endpoints (Lindsay, 1984; Genant, 1982), non-contraceptive estrogens were reclassified as "effective" for the treatment of osteoporosis, including Premarin® Tablets (DESI 1543; 51 FR 12568, April 11, 1986).

In 1990, formal guideline texts were revoked for estrogen drug product professional and patient labeling, and replaced by informal labeling guidance texts (55 FR 18761, May 4, 1990). The availability of the most recently revised Labeling Guidance for Estrogen Drug Products Physician Labeling and Patient Package Insert (1992) was announced on June 28, 1994 (59 FR 33300).

CYCRIN TABLETS: In 1959, NDA #11-839 for Provera® Medroxyprogesterone Acetate (MPA) Tablets, sponsored by The Upjohn Company, became effective based on a satisfactory safety review. Following the DESI efficacy review, FDA classified Provera Tablets as "effective" for two indications:

Secondary amenorrhea.
Abnormal uterine bleeding in the absence of organic pathology, such as submucous fibroids or uterine cancer.

In 1977, labeling directed to the patient was required for all prescription estrogen and progestational drug products for human use, and guideline texts for professional and patient labeling were published (42 FR 37636 through 37648, July 22, 1977), and later revised (54 FR 1243, January 12, 1989).

On October 30, 1992, ANDA's #81-239 and #81-240 were approved for Cycrin[R] MPA Tablets 2.5 mg and 5.0 mg, respectively, sponsored by Wyeth-Ayerst Laboratories, as generic versions of Upjohn's Provera[R] Tablets, under the Waxman-Hatch Amendments to the Act.

To date, FDA has not approved any progestin drug product, including Provera[R] and Cycrin[R], for indicated usage in postmenopausal women. Based on accumulating epidemiologic evidence, oral MPA has been increasingly prescribed "off-label"with estrogen replacement therapy (ERT) as hormone replacement therapy (HRT) to postmenopausal women with a uterus to prevent endometrial cancer. The Fertility and Maternal Health Drugs Advisory Committee discussed this subject on February 10, 1984, and April 27, 1984, and concluded that the data were inadequate to determine the risks of concomitant progestin use with ERT. It revisited the issue on February 2, 1990, and June 20-21, 1991, and concluded: (1) that the addition of a progestin to ERT for more than 10 days each cycle greatly reduces the risk of endometrial cancer and does not reduce the protective estrogen effect on bone density; and (2) that due to the relative recency of HRT use, insufficient data were available to determine the effect of added progestins on either the risk of breast cancer or the possible cardioprotective effects associated with ERT.

6.1 Relevant human experience

Since the mid-1970's, observational data have consistently documented a direct relationship between unopposed ERT and increased risk of endometrial cancer, with the strength of association dependent upon dosage and duration of estrogen exposure (Ziel, 1975; Shapiro, 1985). In the 1980's, an inverse relationship was suggested between concomitant progestin use with ERT and the risk of endometrial hyperplasia, a possible precursor of endometrial cancer (Gelfand MM, 1989). The strength of this association appeared more dependent upon the monthly duration of progestin exposure than upon progestin dosage, with at least 10 days of treatment per month correlated with optimal endometrial outcomes. In the 1990's, observational data have begun to emerge reporting a reduction in endometrial cancer risk with HRT (Persson, 1989; Voigt, 1991), but the optimal progestin, its dosage, and regimen that would maximize this benefit while minimizing attendant risks remained to be determined..

Meanwhile, emerging reports in the 1980's suggested a direct relationship between ERT and increased risk of breast cancer (Hoover, 1976; Brinton, 1986), especially in long term users. Meta analyses of these observational findings failed to settle the controversy over this question (Dupont, 1991; Steinberg, 1991; Sillero-Arenas, 1992; Grady, 1992; Colditz, 1993), while observational data on prolonged estrogen usage continued to accrue (Yang, 1992; Risch, 1994). Because of the relative recency of HRT usage in the U.S., most published relative risk (RR) estimates of breast cancer and menopausal hormone use have continued to apply primarily to ERT usage, reporting overall RR's of 1.2 to 1.5 for usage of 3-5 years, and RR estimates of up to 2.0 for very prolonged usage (10-15 years or more).

In contrast to the protective effect of added progestins on the endometrium, recently reported RR estimates for HRT and breast cancer suggest that concomitant progestins do not reduce and may exacerbate the risk of breast cancer associated with ERT (Bergkvist, N Engl J Med 1989; Ewertz, 1988; Colditz, 1992; Colditz, 1993), without necessarily increasing breast cancer mortality (Bergkvist, Am J Epidemiol 1989; Yuen, 1993). Breast cancer is a major public health problem in the United States: the average American woman currently faces an approximately 1 in 10 total lifetime risk of developing breast cancer, with the vast majority of cases occurring after menopause. Thus, in the postmenopausal population, even small increments in the relative risk of breast cancer have great public health significance. Because of the long latency between exposure to promotional agents and detection of clinical tumors, however, prospective studies take many years to conduct and require extremely large sample sizes to ensure statistically meaningful treatment group comparisons. Since many more years are still needed before the relationship between HRT and breast cancer can be definitively determined, the public health impact of this safety concern increases with the growing popularity of HRT usage by a rapidly expanding population of perimenopausal "baby boom" women. As such, the true effect of HRT on breast cancer incidence and mortality must be considered the single most important safety issue concerning this class of drugs.

Although recent observational data strongly suggest that ERT reduces cardiovascular (especially coronary heart disease) morbidity and mortality (Bush, 1987; Stampfer, 1991), obvious selection bias permeates this literature, with treated women consistently slimmer, healthier, and less likely to have diabetes mellitus than untreated women. Unbiased data on the cardiovascular effects of ERT and HRT are expected to become available within the next 5-15 years from the ongoing NIH-sponsored Randomized Clinical Trial of the Women's Health Initiative (WHI/RCT: a primary/secondary prevention trial, see section 6.2 below) and the Wyeth-Ayerst-sponsored Heart and Estrogen Replacement Study (HERS: a secondary prevention trial, see section 6.2 below). Although the WHI/RCT is adequately designed to definitively answer the ERT/HRT cardiovascular question (i.e., whether drug efficacy or selection bias account for observed risk reduction), it is doubtful that even the WHI/RCT has sufficient statistical power to clearly define the relationship between HRT and breast cancer.

6.2 Important information from related IND's and NDA's.

IND /

The Postmenopausal Estrogen and Progestin Interventions (PEPI) trial is a recently completed, NIH-sponsored, 3-year, 7-center, randomized, placebo-controlled, parallel trial of the effects of continuous and sequential treatment with Premarin® with/without Cycrin® MPA or micronized progesterone on coronary heart disease risk factors in 875 healthy postmenopausal women, ages 45-64. Subjects were stratified by hysterectomy status and clinical center, and randomly assigned to one of 5 treatment groups: Placebo; Premarin 0.625 mg po QD alone;

6.5 Other relevant background information

In 1978, Ayerst Laboratories submitted a labeling supplement for the concomitant use of Premarin and MPA tablets, based on a literature review suggesting that the addition of MPA to Premarin treatment attenuates the incidence of endometrial hyperplasia. The supplement was reviewed by the Fertility and Maternal Health Drugs Advisory Committee, which concluded that there was insufficient evidence to establish the purported beneficial effect of the added progestin and recommended that further studies be conducted. In 1983, Ayerst Laboratories submitted IND #21,696 to conduct a placebo-controlled and unopposed estrogen-controlled trial of the effects of cyclic Premarin 1.25 mg x 21 days/month with sequential MPA (Upjohn's Provera^{R} Tablets) 10 mg x 10 days/month, on endometrial biopsy endpoints. Inadequate enrollment eventually led to the premature termination of this study.

On July 25, 1984, a meeting was held at the sponsor's request to discuss the labeled indications that would be permitted for the combination product. The Division of Metabolism and Endocrine Drug Products (DMEDP) agreed that combination product labeling could include all of Premarin's labeled indications, provided that biopsy-proven hyperplasia was shown to be reduced by the added progestin, and that the lowest effective progestin dose was determined in the clinical trial. In March 1986, an NDA was submitted, based on additional literature as well as limited data collected from the terminated study, but it was non-approvable, due to inadequate evidence to support the claimed indication of reduced incidence of endometrial hyperplasia.

In 1988, Wyeth-Ayerst had a number of teleconferences and meetings with DMEDP to discuss the design of the clinical study which would support the current NDA. These discussions focused on the number of women and study sites to be included in the trial as well as concurrence that one study of this magnitude (estimated sample size of 2080 with blocked randomization) would be adequate to support approval. The agreed-upon study design included the evaluation of 4 combination HRT regimens of Premarin and MPA compared to a Premarin-alone group, and reaffirmed the earlier agreement that all approved indications for Premarin alone, including osteoporosis, would apply to the combination, based on the assumption that the addition of MPA would not attenuate Premarin's beneficial effects. DMEDP agreed to allow the osteoporosis claim for the combination, provided the recommended combination dose of Premarin was the same as the recommended Premarin dose for osteoporosis (0.625 mg po daily administered cyclically 3 weeks on and one week off). It was acknowledged during these discussions that neither this study, nor any other similar clinical trial would likely resolve the issues related to breast cancer associated with either ERT or HRT, given that years of epidemiologic study had not completely settled them. Thus, the sponsor states that "agreement was reached that an evaluation of breast cancer risk would not be a subject of evaluation in this program" (NDA vol 1.1, cover letter, December 22, 1992, p 2).

7. Description of Clinical Data Sources

The primary data source for this NDA is the large-scale, multicenter, randomized, prospective, placebo-controlled safety and efficacy study of concomitant MPA at 2 dosage levels and regimens, conducted by the sponsor under Protocols 713B-300 and 713B-301. This pivotal trial studied 1724 women in Europe and the United States between May 1989 and March 1992.

Other sources of safety information include 4 small ancillary safety and efficacy studies conducted by Ayerst Laboratories under Protocols 84-915-MD and 84-930-MD (double-blind, randomized, 3-month crossover studies of fixed and phasic cyclic sequential doses of Premarin x 25 days with MPA 10 mg x 10 days, which enrolled a total of 119 women), and under Protocols 82-028-MD and 84-903-MD (double-blind, randomized, placebo- and active-controlled, parallel 6-12 month study of Premarin 1.25 mg x 21 days/MPA 10 mg x 10 days, which enrolled a total of 235 women). These studies were terminated by administrative decision of the sponsor in 1988 due to recruitment difficulties.

Additional supportive safety information is provided from biopharmaceutics studies conducted by the sponsor under the following protocols:

84-280-CR:	Multiple-dose crossover of separate versus combination Premarin 2.5 mg, MPA 10 mg x 6 days	n= 6
713X-110-US:	Comparative bioavailability study of marketed and research formulations of 0.625 mg Premarin tablets	n= 6
713B-103-US:	Drug interaction study of separate versus combination doses 2 x 0.625 mg Premarin alone, 2 x 5.0 mg MPA alone, or both combined	n= 54
713-B-114-US:	Food effect study of concomitant Premarin 0.625 and MPA 2.5	n= 20
713-B-104-US:	Bioequivalence study of separate Premarin and Cycrin tablets and a combination CE/MPA 0.625/2.5 mg tablet	
713-B-107-US:	Bioequivalence study of separate Premarin and Cycrin tablets and a combination CE/MPA 0.625/2.5 mg tablet	n= 66
713-B-111-US:	Bioequivalence study of separate tablets and a combination CE/MPA 0.625/5.0 mg tablet	
713-B-101-US:	Bioequivalence study of separate tablets and a combination CE/MPA 0.625/5.0 mg tablet	
713-B-109-US:	Bioequivalence study of separate tablets and a combination CE/MPA 0.625/5.0 mg tablet	n=120
		272

Further safety information is provided in the Safety Update Report (NDA vol 9.1) by a review of spontaneous reports to the "WCDSS" database maintained by Wyeth-Ayerst to identify serious adverse drug experiences from clinical trials and postmarketing exposure worldwide. This report includes all adverse events reported between December 6, 1983, and October 31, 1994. In addition, at the request of this reviewer, a search was conducted of the FDA Spontaneous Reporting System since 1975 for domestic adverse drug events for the drug combination Premarin - Provera and for Premarin alone.

WARNINGS:

1. Section on "*Induction of malignant neoplasms*":

A. Breast cancer section should be modified to read:

(1) First paragraph, first sentence: Some studies have reported a moderately increased risk of breast cancer (relative risks of 1.3 to 2.0) in those women on estrogen replacement therapy taking higher doses, or in those taking lower doses for prolonged periods of time, especially in excess of 10 years.

(2) First paragraph, second sentence: The majority of studies, however, have not shown this association in women who have ever used estrogen replacement therapy.

(3) Second paragraph, first sentence: The effect of added progestins on the risk of breast cancer is unknown, although a moderately increased risk in those taking combination estrogen/progestin therapy has been reported.

(4) Second paragraph, second sentence should be added describing the NDA findings: "In a one year clinical trial of PREMPRO, PREMPHASE, and Premarin alone, 5 new cases of breast cancer developed among 1377 women receiving the combination treatments, while no new cases developed among 347 women receiving Premarin alone."

**N.B.: Sponsor's 12/29/94 response, proposing alternate text ("were detected" instead of "developed") and an additional sentence ("The overall incidence of breast cancer in this clinical trial does not exceed that expected in the general population.") are acceptable.

(5) Third paragraph, first sentence: Women on hormone replacement therapy should have regular breast examinations and should be instructed in breast self-examination, and women over the age of 50 should have regular mammograms.

B. Endometrial cancer section should be modified to read:

(1) First paragraph, first sentence: The reported endometrial cancer risk among users of unopposed estrogen was about 2 to 12-fold or greater than in nonusers and appears dependent on duration of treatment and on estrogen dose.

(2) First paragraph, third sentence: The greatest risk appears associated with prolonged use, with increased risks of 15 to 24 fold for five years or more.

(3) Second paragraph, first sentence: "A large clinical trial has demonstrated that ...

Breast cancer developed within 1 year following normal baseline exams and mammograms in five subjects during study drug treatment, with all cases occurring in the combination treatment groups (4 of 5 in the continuous regimens A and B). Although no statistically significant differences in breast cancer incidence were detected between treatment groups, the clustering of cases in the Premarin/MPA groups (especially in the continuous treatment regimen) raises concern that concomitant progestin may exacerbate the increased breast cancer risk reported with prolonged unopposed estrogen treatment. This concern should be addressed post-approval by the sponsor, by conducting a comprehensive Phase IV investigation of breast cancer risk in users and non-users of the NDA regimens. It is essential that this Phase IV study be designed with adequate statistical power to rule out relative risks close to 1.0 in the comparison of unopposed Premarin and Premarin/MPA-treated women, and it should be powered to evaluate differences between Premarin/MPA groups by treatment regimen (i.e., PREMPRO versus PREMPHASE).

13. *Recommendations*

This NDA is recommended for approval under the following conditions:

1. The sponsor will conduct a comprehensive Phase IV investigation of breast cancer risk in users and non-users of the NDA regimens.

   The most feasible approach appears to be a large-scale case-control study in areas of the U.S. where the NDA regimens are used extensively. It is essential that this Phase IV study be designed with adequate statistical power to rule out relative risks close to 1.0 in the comparison of unopposed Premarin and Premarin/MPA-treated women, and it should be powered to evaluate differences between Premarin/MPA groups by treatment regimen (i.e., PREMPRO versus PREMPHASE).

2. The sponsor expeditiously conducts the Phase IV, dose-ranging clinical trial already proposed of lower doses of PREMPRO (containing Premarin/MPA @ 0.625 mg/2.5 mg, 0.45 mg/2.5 mg, 0.45 mg/1.25 mg, and 0.3 mg/1.25 mg) on bone mineral density and endometrial histology endpoints.

   As previously agreed with Wyeth-Ayerst, it remains to be determined whether concomitant MPA may reduce the lowest effective dose of Premarin at bone target tissue when administered to calcium replete women 365 days/year. If so, the long term PREMPRO/PREMPHASE safety profile could be substantially improved, especially with regard to breast cancer risk with chronic usage. Because American women are extensively exposed to these drugs, even subtle reductions in dosage requirements may yield significant reductions in attributable risk for long-term adverse treatment sequelae.

3. All required modifications to the labeling, as detailed in section 11 above and FAX'ed to the sponsor on 12/28/94, are made prior to launch of the new products.

   The approval letter should state that Wyeth-Ayerst's 12/29/94 FAX indicating agreement with these labeling changes is acceptable except for the following:

   A. Since current Cycrin labeling states "**A statistically significant association has been demonstrated between use of estrogen-progestin combination drugs and the following serious adverse reactions: thrombophlebitis; pulmonary embolism; and cerebral thrombosis and embolism. For this reason, patients on progestin therapy should be carefully observed.**" (PDR, 48th edition, 1994, p 919), this entire statement must also be included in the PREMPRO and PREMPHASE labeling.

   B. The *Gallbladder disease* section of the Warnings section should accurately describe the results of the clinical trial. Wyeth-Ayerst should explain their statement that they found "only 4 cases of 1029, not 6 of 1029", given that the Integrated Safety Summary of the NDA states "**seven (7) patients in the multicenter study, 5 in group A, 1 in group B and 1 in group E, developed cholecystitis with cholelithiasis that required cholecystectomy**" (NDA vol 1.57 p 27).

4. The sponsor agrees to enlarge the print size of the "Directions for Use" package labeling on Card 2 of the PREMPHASE blister package to match that on Card 1 within one year following approval of this NDA.

Linda J. Golden, M.D., Medical Officer – 12/29/94
Date

Attachment: Sponsor's Table 1, NDA vol 1.40 pp 137-145 (Investigators for Pivotal Trial)

Exhibit 5

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 05-1606-CI-13

PETER ESPOSITIO, individually and as Personal Representative of the Estate of LORETTA ESPOSITO,

Plaintiff,

Vs.

WYETH, INC., and WYETH PHARMACEUTICALS, INC., and ESI LEDERLE; CAROL BANKS; and MARY TATE,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION IN LIMINE TO BAR THE "REASONABLE COMPANY" TESTIMONY OF DRS. CHERYL BLUME, SUZANNE PARISIAN, AND DONALD AUSTIN, AND DR. BLUME'S LABELING OPINIONS

THIS CAUSE came before the court upon Defendants' Motion in Limine to Bar the "Reasonable Company" Testimony of Drs. Cheryl Blume, Suzanne Parisian, and Donald Austin, and Dr. Blume's Labeling Opinions. After hearing from the parties and considering the submissions the court finds the motion should be granted in part.

The Defendants have objected to the testimony of three "expert" witnesses who are prepared to offer their opinions concerning the reasonableness of the conduct of the defendant pharmaceutical companies. The issue presented is not a Frye question since it involves an expression of pure opinion based upon purported facts. There is also no doubt that each of the three witnesses have some special education, training or experience which might qualify them to give some kind of opinion testimony.

The court's concern is that nothing in the presentation reveals the need for any expert to actually express their personal opinion about the reasonableness of the company conduct. It is the court's belief that the jury will be fully capable of listening to the facts which reveal what the conduct was, and to receive evidence relevant to the reasonableness of the conduct from which they may make their own reasoned judgment regarding the conduct. Although the law does permit experts to render opinions regarding an ultimate issue in a case, the court is mindful that experts should not be permitted to testify regarding a legal conclusion that the jury can reach independently from the facts. See: Estate of Murray ex rel, Murray v. Delta Health Group, Inc., 2010 WL 565657 (Fla. 2nd DCA 2010).

The Plaintiff has asserted that a number of courts in foreign jurisdictions have allowed the kind of testimony complained of here. In fact, they assert that no trial court has excluded such testimony or been reversed for allowing its admission. The undersigned judge notes that broad discretion is vested in the trial courts regarding such matters so the sustaining of admissibility on appeal is not indicative of the best ruling in every case. Similarly, the degree to which a trial court might reasonably function as a gate keeper for such opinions can vary depending upon the circumstances, the jurisdiction's own common law as well as the judge's evaluation of a lay person juror's ability to evaluate the facts without an expert's legal conclusion.

To be clear, this court will certainly allow the Plaintiff to present fact evidence and testimony which a juror can use to consider the reasonableness of the Defendants' conduct. It is perfectly appropriate to offer such relevant matters as industry standards, government regulations, statutes, internal policies, FDA standards for testing, industry recommendations, customs or practice, administrative rules, or other factors bearing upon a corporation's conduct.

On the other hand, it seems unnecessary and (to this court) inappropriate to have a witness go beyond testimony establishing such facts to express a personal conclusion that the defendants non-conformity or deviation constitutes negligence. The jury function is usurped when an expert is unnecessarily permitted to explain what is reasonable or unreasonable.

A homicide detective with years of experience and training may be able to evaluate the circumstantial evidence of a suspicious death, however the courts do not permit such an expert to explain to the jury the evidence and then render his opinion that it was premeditated murder. In automobile accident cases an accident reconstruction expert may testify to conclusions about the cause of the collision, the speed of a vehicle or other factors but we leave to the jury the decision of whether these facts combine to prove negligence.

In conclusion, the court is compelled to grant the motion in part and to limit the expert testimony. While the witnesses may discuss facts and opinions based on their special education, training and experience, their personal conclusions about the reasonableness or unreasonableness of the Defendants' conduct will not be permitted.

The Defendants also object to the testimony of the experts on the grounds that certain testing could have been done but was not. The court finds that such experts may be allowed to testify about tests, procedures, accepted methods, scientific discoveries and information which could be used by a manufacturer of similar products. Like all other witnesses the accuracy or validity of such testing is subject to cross-examination and rebuttal. This does not give license to the expert to opine that the company was negligent or unreasonable.

With regard to the specific objections to the opinions of Dr. Blume concerning the adequacy of the product label, the court concludes this testimony should be excluded. The Defendants correctly observe that generally a medical expert would be the appropriate witness

when the inadequacy of the manufacturer's warnings to physicians is at issue. If expert testimony is needed to explain to a lay person what prescribing physicians understand from specific words on a label only a similarly situated physician or medical witness could be qualified to do so. If the purported problems with the label are not specific to the doctors understanding of the language used then jurors do not need an expert on the subject of labels to review all the "facts" and express an opinion about adequacy. If there is evidence that the physician or pateint needs to be warned about a particular matter those facts should be presented by evidence. The jurors will be able to decide whether a particular hazard or problem indeed existed and whether the warning label was adequate without any need for an expert to tell them how to decide this ultimate issue.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this _____ day of April, 2010.

ANTHONY RONDOLINO, Circuit Judge

Copy furnished to:

Edward W. Gerecke, Esq.
James D. Clark, Esq.
Tobias Millrood, Esq.
Chen-Sen Wu, Esq.
Rebecca Moos, Esq.
George E. McDavid, Esq.
Robert K. Jenner, Esq.
James F. Szaller, Esq.

TRUE COPY
Original Signed
APR 14 2010

Exhibit 6

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jessica Lopez,

Plaintiff,

vs.

I-Flow Inc., a Delaware Corporation, et al.,

Defendants.

No. CV 08-1063-PHX-SRB

ORDER

Cole D. Chapman,

Plaintiff,

vs.

I-Flow Inc., a Delaware Corporation, et al.,

Defendants.

No. CV 08-1064-PHX-SRB

Matthew B. Goldstein,

Plaintiff,

vs.

I-Flow Inc., a Delaware Corporation, et al.,

Defendants.

No. CV 08-1859-PHX-SRB

Julie A. Eggler, Plaintiff, vs. I-Flow Inc., a Delaware Corporation, et al., Defendants.	No. CV 09-0040-PHX-SRB
Anthony B. Hannigan, Plaintiff, vs. I-Flow Inc., a Delaware Corporation, et al., Defendants.	No. CV 09-0042-PHX-SRB
Linda Relkin and Herb Relkin, Plaintiffs, vs. I-Flow Inc., a Delaware Corporation, et al., Defendants.	No. CV 09-0044-PHX-SRB

Pending before the Court are 28 Motions to Exclude filed by Defendant I-Flow Corporation ("I-Flow") in the above-captioned cases. I-Flow moves to exclude the following experts disclosed by Plaintiffs:

- Dr. Stephen Badylak, general causation expert;
- Dr. Brian L. Shafer, general causation expert;
- Dr. David S. Bailie, general causation expert;
- Dr. Warren R. Dunn, general causation expert; and
- Dr. Suzanne Parisian, regulatory and labeling expert.

I-Flow also moves to exclude general causation expert Dr. Charles Beck, whom Plaintiffs did not disclose as an expert witness in these actions but on whose work the disclosed general causation experts purportedly rely. In addition, I-Flow moves to exclude all four of Plaintiffs' disclosed general causation experts in one separate, redundant motion in each case.

In this Order, the Court resolves all 28 of I-Flow's Motions to Exclude. By case and docket number, the motions resolved are as follows:

- Case No. CV 08-1063-PHX-SRB, Docs. 237 (Parisian), 239 (Badylak), 240 (General Causation);
- Case No. CV 08-1064-PHX-SRB, Docs. 183 (Badylak), 184 (Parisian), 186 (Beck), 187 (General Causation);
- Case No. CV 08-1859-PHX-SRB, Docs. 109 (Badylak), 110 (Parisian), 112 (General Causation);
- Case No. CV 09-0040-PHX-SRB, Docs. 145 (Badylak), 146 (Bailie), 149 (Parisian), 150 (Shafer), 152 (General Causation), 154 (Dunn);
- Case No. CV 09-0042-PHX-SRB, Docs. 128 (Badylak), 129 (Bailie), 131 (Parisian), 132 (Shafer), 133 (General Causation), 137 (Dunn); and
- Case No. CV 09-0044-PHX-SRB, Docs. 139 (Badylak), 143 (Shafer), 144 (Parisian), 145 (General Causation), 147 (Bailie), 148 (Dunn).

I. BACKGROUND

In these actions, Plaintiffs make various claims against I-Flow and other Defendants related to the implantation of a pain pump manufactured by I-Flow in each Plaintiff's shoulder during surgery. (*E.g.*, Case No. CV 08-1063-PHX-SRB, Doc. 34, Am. Compl. ¶ 2.) The pain pump continuously injected an anesthetic into the shoulder following surgery. (*E.g., id.*) Plaintiffs claim that the continuous injection of certain amounts of anesthetic into their shoulders after surgery caused chondrolysis–rapid loss of articular cartilage–which resulted in injury. (*E.g., id.* ¶¶ 14-15.)

As part of their cases, Plaintiffs have disclosed four general causation experts, Drs. Bailie, Shafer, Badylak and Dunn. (Case No. CV 08-1063-PHX-SRB, Doc. 248, Pls.' Resp. in Opp'n to Def. I-Flow's Mot. to Exclude Pl.'s Gen. Causation Experts ("Gen. Causation

Resp.") at 6.)[1] Plaintiffs have also disclosed Dr. Parisian as an expert in FDA regulations and labeling. (Parisian Resp. at 1.) I-Flow now moves to exclude all of these experts under Rule 702 of the Federal Rules of Evidence and the principles set forth in *Daubert v. Merrell Dow Pharm., Inc.* ("*Daubert I*"), 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526

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[1] With respect to each particular expert, I-Flow's Motion to Exclude filed in one of the above-captioned cases is identical to the Motions I-Flow filed in the other above-captioned cases. Plaintiffs together filed only one set of Responses to all 28 Motions under Case Number CV 08-1063-PHX-SRB. Likewise, I-Flow filed only one set of Replies under the same Case Number. For the sake of convenience in this Order, the Court refers to just one set of Motions, Responses and Replies, as follows:

- Motions: Case No. CV 08-1063-PHX-SRB,
  Doc. 237 - "Parisian Mot."
  Doc. 239 - "Badylak Mot."
  Doc. 240 - "Gen. Causation Mot."
  Case No. CV 08-1064-PHX-SRB,
  Doc. 186 - "Beck Mot."
  Case No. CV 09-0040-PHX-SRB,
  Doc. 146 - "Bailie Mot."
  Doc. 150 - "Shafer Mot."
  Doc. 154 - "Dunn Mot."

- Responses: Case No. CV 08-1063-PHX-SRB
  Doc. 246 - "Parisian Resp."
  Doc. 248 - "Gen. Causation Resp."
  Doc. 249 - "Badylak Resp."
  Doc. 250 - "Bailie Resp."
  Doc. 251 - "Dunn Resp."
  Doc. 252 - "Shafer Resp."
  Doc. 253 - "Beck Resp."

- Replies: Case No. CV 08-1063-PHX-SRB
  Doc. 264 - "Badylak Reply"
  Doc. 265 - "Beck Reply"
  Doc. 266 - "Parisian Reply"
  Doc. 267 - "Bailie Reply"
  Doc. 268 - "Dunn Reply"
  Doc. 269 - "Shafer Reply"
  Doc. 270 - "Gen. Causation Reply"

U.S. 137 (1999). (*E.g.*, Bailie Mot. at 1.) No party has requested a *Daubert* hearing, nor does the Court find one necessary. For the reasons set forth below, the Court grants I-Flow's Motions to Exclude with respect to Drs. Dunn and Parisian and denies the balance of I-Flow's Motions to Exclude.

II. LEGAL STANDARDS AND ANALYSIS

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under Rule 702, the trial court acts as a "gatekeeper" and ensures that the proferred scientific testimony meets certain standards of both relevance and reliability before it is admitted. *Daubert I*, 509 U.S. at 595-97. An expert opinion is reliable if it is based on proper methods and procedures rather than "subjective belief or unsupported speculation." *Id.* at 590. The test for reliability "'is not the correctness of the expert's conclusions but the soundness of his methodology.'" *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007) (quoting *Daubert v. Merrell Dow Pharm., Inc.* ("*Daubert II*"), 43 F.3d 1311, 1318 (9th Cir. 1995)). Alternative or opposing opinions or tests do not "preclude the admission of the expert's testimony–they go to the *weight*, not the admissibility." *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998). Furthermore, "'[d]isputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.'" *Id.* (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995)).

Under Rule 702, the party proffering expert testimony has the burden of showing the admissibility of the testimony by a preponderance of the evidence. *Daubert I*, 509 U.S. at 592 n.10. The Ninth Circuit Court of Appeals has observed that the Supreme Court "heavily emphasizes that judges are entitled to broad discretion when discharging their gatekeeping function" related to the admission of expert testimony. *United States v. Hankey*, 203 F.3d

1160, 1168 (9th Cir. 2000) (citing *Kumho Tire*, 526 U.S. at 152). The court considers four factors to determine if expert testimony will assist the trier of fact: "(i) whether the expert is qualified; (ii) whether the subject matter of the testimony is proper for the jury's consideration; (iii) whether the testimony conforms to a generally accepted explanatory theory; and (iv) whether the probative value of the testimony outweighs its prejudicial effect." *Scott v. Ross*, 140 F.3d 1275, 1285-86 (9th Cir. 1998) (citations omitted).

A. Dr. David S. Bailie, General Causation Expert

In an effort to proffer evidence showing a causal link between the I-Flow pain pump and Plaintiffs' injuries, Plaintiffs have disclosed Dr. Bailie as a general causation expert. (Gen. Causation Resp. at 6.) I-Flow asserts that Dr. Bailie should be excluded because, under Rule 702, his anticipated testimony is not supported by sufficient facts or data, he did not use reliable principles or methodologies in rendering his opinions, and he is not qualified to testify regarding FDA regulations and pain pump advertising. (Bailie Mot. at 2.) Plaintiffs point out that Dr. Bailie has already testified at trial as a general causation expert regarding I-Flow pain pumps and that he was the implanting surgeon in several of the above-captioned actions. (Bailie Resp. at 2.)

I-Flow first argues that Dr. Bailie's theory linking the pain pump to chondrolysis is not widely accepted in the scientific community and conflicts with his own case series. (Bailie Mot. at 2-7.)[2] In support of this argument, I-Flow provides selected quotes from various expert opinions that indicate that further study is warranted on the causes of shoulder chondrolysis. (*Id.* at 3.) However, as Plaintiffs point out, I-Flow either quotes the experts' opinions out of context (Lubowitz & Poehling, McNickle), quotes equivocal language in very

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[2] I-Flow filed two separate motions requesting the same relief for each disclosed expert. (*E.g., compare* Gen. Causation Mot. *with* Bailie Mot.) The Local Rules of this Court restrict the number of pages a moving party may file in support of a motion. LRCiv. 7.2. In addition to being largely redundant, I-Flow's filing of two motions for the same request violates the Local Rules. In any case, the Court notes that consideration of I-Flow's arguments in its General Causation Motion does not in any way change the Court's conclusions with respect to I-Flow's Motions to Exclude individual experts.

early chondrolysis studies (Petty, Beck & Hansen), quotes the conclusion for a different inquiry (Coobs & LaPrade), or quotes a suspect review of other studies that concludes that the causes of chondrolysis are "multifactorial" (Solomon). (*See* Bailie Resp. at 7-9, 12-13.) In support of Dr. Bailie's explanatory theory, Plaintiffs identify studies by Chu, Bogatch, McNickle, Gomoll and Dragoo as well as a review of studies in a text by Wei and Galatz. (*Id.* at 6-18.) As other courts have found with respect to expert conclusions similar to Dr. Bailie's, this Court finds that Plaintiffs have identified more than sufficient "objective, verifiable" evidence in the form of cohort, animal and in vitro cartilage studies in addition to the various case series to support Dr. Bailie's opinions.[3] *See, e.g.*, *McClellan v. I-Flow Corp.*, 710 F. Supp. 2d 1092, 1105, 1115, 1130-31 (D. Or. 2010); *Schott v. I-Flow Corp.*, 696 F. Supp. 2d 898, 905 (S.D. Ohio 2010); *Zink v. SMI Liquidating, Inc.*, Civil Action No. 08-95 (WOB), 2010 WL 1839907, at *2 (E.D. Ky. May 7, 2010). In addition, the studies and series that Plaintiffs have cited have been published and adequately subjected to peer review. The Court thus concludes that Dr. Bailie's explanatory theory is generally accepted by the medical community for purposes of I-Flow's Rule 702 challenge. *See McClellan*, 710 F. Supp. 2d at 1115-17.

The Court finds no merit in I-Flow's suggestion that Dr. Bailie's present conclusions should be excluded because they conflict with his own 2009 case study. (*See* Bailie Mot. at 3-4.) In that study, Dr. Bailie cautioned against the use of "large doses of intra-articular placement of local anesthetics" until more data research could be completed. (Am. O'Leary Decl., Ex. 44, D. Bailie and T. Ellenbecker, *Severe Chondrolysis after Shoulder Arthroscopy: A Case Series*, 1-6 J. SHOULDER & ELBOW SURGERY (2009).) Plaintiffs state that Dr.

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[3] Plaintiffs' experts consistently state that the data that would be most reliable, those from randomized controlled trials on human patients to study the effect on the shoulder of continuous infusion of anesthetic via pain pump, or "Level I studies," would be unethical to obtain in light of the known possible adverse effects on the patients. (*See, e.g.*, Case No. CV 08-1063-PHX-SRB, Docs. 254-61, Am. Decl. of Leslie W. O'Leary in Supp. of Pl.'s Resp. in Opp'n to Def. I-Flow's Mot. to Exclude Pl.'s Experts ("Am. O'Leary Decl."), Ex. 78 at 73.)

Bailie's present conclusions are based upon additional research and data, and the evidence bears that out. (Bailie Resp. at 4-5.) Dr. Bailie's present conclusions by no means fall below the Rule 702 threshold. *See Primiano v. Cook*, No. 06-15563, 2010 WL 1660303, at *4 (9th Cir. Apr. 27, 2010).

I-Flow next contends that Dr. Bailie's conclusions amount to guesses in view of the lack of certainty in the medical evidence as to the cause of chondrolysis. (Bailie Mot. at 4-7.) However, lack of certainty is not grounds for the Court to exclude Dr. Bailie's conclusions, but instead goes to the weight of his anticipated testimony. *Primiano*, 2010 WL 1660303, at *5 ("Lack of certainty is not, for a qualified expert, the same thing as guesswork.") Likewise, the lack of certainty in the medical evidence as to the exact anesthetic dose that causes chondrolysis does not make Dr. Bailie's conclusions unreliable under Rule 702, contrary to I-Flow's contentions. (*See* Bailie Mot. at 11-12.) Plaintiffs have identified reliable medical studies showing that the toxicity of anesthetics on cartilage is dose-dependent. (Bailie Resp. at 15-18.) Dr. Bailie's conclusions are thus supported by the findings in medical studies. *See McClellan*, 710 F. Supp. 2d at 1111, 1117. It was not improper for Dr. Bailie to offer an opinion that continuous injection of anesthetics causes chondrolysis, even if the exact amount of anesthetic required may be uncertain. *See Clausen v. M/V New Carissa*, 339 F.3d 1049, 1060 (9th Cir. 2003).

The Court likewise disagrees with I-Flow's assertion that Dr. Bailie's conclusions amount to *ipse dixit* because he did not sufficiently explain how he reached his conclusions, relying instead on a "totality" of scientific literature. (Bailie Mot. at 7-12.) Rule 702 requires consideration of "the *overall* sufficiency of the underlying facts and data, and the reliability of the methods, as well as the fit of the methods to the facts of the case." *United States v. W.R. Grace*, 504 F.3d 745, 765 (9th Cir. 2007) (finding that the trial court erred when it conducted "a document-by-document Rule 702 analysis that deconstructed the experts' testimony in a manner not contemplated by Rule 702"). It was not improper for Dr. Bailie to rely on the totality of the medical opinions to reach his conclusions. *See McClellan*, 710 F. Supp. 2d at 1115, 1130-31.

Finally, I-Flow argues that Dr. Bailie is not qualified to testify "that pain pumps were not 'FDA approved, safe and efficacious for the uses being marketed to the orthopedic surgeons,'" because Dr. Bailie has no FDA or related experience. (Bailie Mot. at 13-14 (quoting *id.*, Ex. 1 at 4).) In making its argument, I-Flow refers to Dr. Bailie's Rule 26 expert report, in which he states:

> [The use of intra-articular pain pumps] became ubiquitous in the orthopedic community across the country, thus creating a "standard of care" that was acceptable. It was assumed that the devices were FDA approved, safe and efficacious for the uses being marketed to the orthopedic surgeons. In addition, there was no concern in the medical community of problems associated with local anesthetic infusion. In fact, device sales representatives were often present in my operating room and assisted with instructing the staff in filling the reservoir and observed and encouraged placement of the catheter in the "operative site", including the joint cavities. At no time was I ever told or provided information that even suggested that this was an off-label use of the device. I was also never told that FDA approval for use in synovial cavities had been applied for and denied. During this time, I was also a paid consultant to Breg, who manufactured and sold pain pumps almost exclusively to orthopedic surgeons.

(Bailie Mot., Ex. 1 at 4.) Plaintiffs assert that Dr. Bailie was simply explaining the circumstances under which he began using pain pumps in his practice, and not whether I-Flow violated FDA regulations in the way that it marketed the pain pumps. (Bailie Resp. at 18.) Plaintiffs further contend that Dr. Bailie's statements are relevant to the issue of proximate cause, because Dr. Bailie was the implanting surgeon for several of the above-captioned Plaintiffs. (*Id.* at 19.) Plaintiffs state that "Dr. Bailie will not offer any opinion testimony on the FDA regulatory scheme or whether [D]efendant's conduct violated any applicable standard of care." (*Id.*)

An expert must be qualified to offer the anticipated testimony. Fed. R. Evid. 702; *Scott*, 140 F.3d at 1286. While Plaintiffs have offered no evidence to show that Dr. Bailie is qualified to testify regarding FDA regulations and, in particular, the marketing of medical products, the Court agrees that Dr. Bailie's Rule 26 report does not indicate that Dr. Bailie plans to offer such testimony. Under Rule 702, I-Flow has provided no basis upon which the Court should exclude Dr. Bailie's anticipated testimony, and Plaintiffs have met their burden

of showing the admissibility of that testimony. The Court therefore denies I-Flow's Motion to Exclude Dr. Bailie.

B. Dr. Stephen Badylak, General Causation Expert

Plaintiffs have also disclosed Dr. Badylak as a general causation expert. (Gen. Causation Resp. at 6.) I-Flow asks the Court to exclude Dr. Badylak's testimony because, under Rule 702, it is not supported by sufficient facts or data, he did not use reliable methodologies in rendering his opinions, and he is not qualified to testify regarding the cause of chondrolysis because he is not an orthopedic surgeon.[4] (Badylak Mot. at 2, 8-9.) The other district courts that have considered the same challenge to Dr. Badylak's testimony under Rule 702 have found his testimony to be admissible. *See McClellan*, 710 F. Supp. 2d at 1131; *Suhn v. Breg, Inc.*, No. Civ. 08-4190-KES (S.D.S.D. Nov. 2, 2010), *filed as* D. Ariz. No. CV 08-1063-PHX-SRB, Doc. 282, Ex. A; *Koch v. Breg, Inc.*, No. Civ. 08-4193-KES (S.D.S.D. Nov. 2, 2010), *filed as* D. Ariz. No. CV 08-1063-PHX-SRB, Doc. 282, Ex. B.

The Court has examined Dr. Badylak's anticipated testimony and finds that Plaintiffs have met their burden of demonstrating its admissibility for general causation under Rule 702. I-Flow makes substantially the same arguments for inadmissibility with respect to Dr. Badylak's opinions as it does for Dr. Bailie's opinions. As the Court found with respect to Dr. Bailie's opinions, Plaintiffs have demonstrated that Dr. Badylak's opinions are supported by reliable medical studies and generally accepted by the medical community for purposes of I-Flow's Rule 702 challenge. (*See* Badylak Resp. at 3-4, 8-14.) Plaintiffs have also shown that Dr. Badylak's testimony is the product of reliable methodologies. (*See id.* at 5-7,

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[4] I-Flow also argues that Dr. Badylak's proffered testimony regarding FDA regulations and pain pump warnings, and particularly that "[t]he misrepresentation of FDA sanctioned use of intra-articular application of pain pumps by industry representatives is clearly and causally related to chondrolysis," is inadmissible. (Badylak Mot. at 2, 6, 18-19.) In response, Plaintiffs state that they "will not be presenting Dr. Badylak to testify on FDA regulatory issues or the adequacy of warnings. His testimony will be limited to medical causation." (Badylak Resp. at 14.) This limitation on Dr. Badylak's testimony renders I-Flow's argument moot.

13-14.) The concerns I-Flow expresses, such as a lack of absolute certainty in the results of the relied upon medical studies, (*see* Badylak Mot. at 12, 16), and a lack of certainty in the anesthetic dose that causes chondrolysis, (*see id.* at 13-14), go to the weight of Dr. Badylak's anticipated testimony, not its admissibility. *See McClellan*, 710 F. Supp. 2d at 1130-31.

I-Flow also contends that Dr. Badylak does not have the requisite background and expertise to offer his opinions regarding the relationship between the continuous injection of certain amounts of anesthetic into the shoulder and chondrolysis. (Badylak Mot. at 8-9.) I-Flow's principal argument is that Dr. Badylak is not an orthopedic surgeon, so he does not have personal experience with the administration of anesthetic into a shoulder after surgery. (*Id.*) Plaintiffs state that Dr. Badylak is more than qualified to testify by virtue of his vast experience as a medical researcher who has focused on the restoration of cartilage and tissue engineering and the fact that he was head team physician at Purdue University for 15 years. (Badylak Resp. at 4-5.) Rule 702 "contemplates a broad conception of expert qualifications." *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994) (permitting expert testimony from a longshore worker with 29 years of experience on issue of the duties of vessel owners related to unusual and hazardous conditions). While Dr. Badylak may not have experience conducting shoulder surgeries, he does have substantial experience as a researcher in the relevant field and as a physician. Plaintiffs have satisfied their burden of showing that Dr. Badylak is qualified to offer his anticipated general causation testimony, and the Court denies I-Flow's Motion to Exclude Dr. Badylak's testimony. *See McClellan*, 710 F. Supp. 2d at 1131.

C. Dr. Brian L. Shafer, General Causation Expert

Plaintiffs have also disclosed Dr. Shafer as a general causation expert. (Gen. Causation Resp. at 6.) I-Flow moves to exclude Dr. Shafer under Rule 702 on the same grounds as Drs. Bailie and Badylak; I-Flow asserts that Dr. Shafer's anticipated testimony is not supported by sufficient facts or data and that he did not use reliable methodologies in rendering his opinions. (Shafer Mot. at 2.) I-Flow also contends that Dr. Shafer is not qualified to testify because, although he is an orthopedic surgeon, he does not employ pain

pumps in his practice and has not conducted independent research on the cause of chondrolysis. (*Id.*) Lastly, I-Flow argues that Dr. Shafer is not qualified to testify regarding FDA regulations and warning requirements. (*Id.* at 9-11.)

While Plaintiffs have disclosed Dr. Shafer as a general causation expert, both Plaintiffs and I-Flow rely on a Rule 26 report prepared by Dr. Shafer for just one of the above-captioned Plaintiffs, Ms. Eggler. (*See id.*, Ex. 2.) The Court notes the distinction between general causation–a showing that "'exposure to a substance can cause a particular disease'"–and specific causation–a showing that "'a given exposure is the cause' of a particular individual's disease." *See Newkirk v. ConAgra Foods, Inc.*, 727 F. Supp. 2d 1006, 1030 (E.D. Wash. 2010) (quoting *Dunn v. Sandoz Pharmaceuticals Corp.*, 275 F. Supp. 2d 672, 676 (M.D.N.C. 2003); Reference Manual on Scientific Evidence 444 (2d Ed. 2000)). The Shafer report that the parties provided to the Court appears aimed at showing specific causation with respect to Ms. Eggler. I-Flow does not object to the lack of general causation conclusions in the Shafer report, and the Court therefore declines to consider excluding Dr. Shafer as a general causation expert on this ground. Moreover, a finding of specific causation such as the one in the Shafer report can only be made if general causation is established. *See id.* at 1030-31.

Plaintiffs state that I-Flow's objections to Dr. Shafer's opinions "are mainly a reiteration of [I-Flow's] global attacks on the medical literature concerning pain pumps and chondrolysis," and the Court agrees. (*See* Shafer Resp. at 3.) As the Court found above with respect to Drs. Bailie and Badylak, Plaintiffs have demonstrated that Dr. Shafer's opinions are supported by reliable medical studies, generally accepted by the medical community, and the product of reliable methodologies for purposes of I-Flow's Rule 702 challenge. (*See id.* at 4-9.) Concerns that I-Flow has expressed with Dr. Shafer's anticipated testimony go to its weight, not admissibility.

The Court also rejects I-Flow's challenge to Dr. Shafer's qualifications to testify as to the cause of chondrolysis in Ms. Eggler's shoulder. While Dr. Shafer has not used pain pumps in his own practice, he is an experienced orthopedic surgeon who regularly conducts

arthroscopic shoulder procedures and assesses patients who have chondrolysis. He has also observed the implantation of pain pumps by other surgeons. Dr. Shafer's qualifications are sufficient to make his anticipated testimony reliable under Rule 702. *See Thomas*, 42 F.3d at 1269. I-Flow's assertion that Dr. Shafer improperly opines on FDA regulations and warnings likewise fails, because the Court finds no evidence that Dr. Shafer plans to offer such opinions. In his report concerning Ms. Eggler, Dr. Shafer simply recounts the circumstances surrounding her surgery by saying that "[p]ain pump catheters were marked for 'intraoperative' and 'surgical' site use" and that "[t]here was no warning against intraarticular use." (Shafer Mot., Ex. 2 at 11.) Furthermore, Plaintiffs state that they will not offer Dr. Shafer to express opinions on FDA compliance and regulations. (Shafer Resp. at 10.) Plaintiffs have satisfied their burden of showing that Dr. Shafer is qualified to offer his anticipated testimony, and the Court denies I-Flow's Motion to Exclude Dr. Shafer's testimony. *See McClellan*, 710 F. Supp. 2d at 1131.

D. Dr. Warren R. Dunn, General Causation Expert

Plaintiffs have also disclosed Dr. Dunn as a general causation expert. (Gen. Causation Resp. at 6.) Specifically, Plaintiffs intend for Dr. Dunn to testify as to the statistical correlation between intra-articular infusion of anesthetics in the shoulder and chondrolysis. (Dunn Resp. at 9.) I-Flow asserts that Dr. Dunn should be excluded because, under Rule 702, his methodology is improper and his anticipated testimony is unreliable. (Dunn Mot. at 4-5.) I-Flow argues that Dr. Dunn improperly converted the data he relied upon from Level IV case series data into Level II retrospective cohort study data for purposes of pooling the data to calculate a statistical correlation. (*Id.*)

The *McClellan* court summarized the levels of weight given to scientific evidence as follows:

> Scientific evidence is assessed on a scale of Level I to Level V, with Level I granted the most scientific weight and Level V the least. A randomized controlled trial is an example of Level I evidence, prospective cohort studies are considered Level II evidence, retrospective cohort studies are examples of Level III evidence, case series are Level IV, and expert opinion is Level V.

710 F. Supp. 2d at 1107 n.10 (quoting *Introducing Levels of Evidence to the Journal*, 85 J. BONE & JOINT SURGERY 1, 2 (Jan. 2003)). The court noted that cohort studies involve two populations, or cohorts, "to determine whether a population exposed to a particular agent is more likely to develop disease than the population which was not exposed." *Id.* (citing REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 340, 389 (Fed. Judicial Ctr. 2d ed. 2000)). "The possibility of bias and error is generally minimized through study design, usually developed before data is gathered, and involves selection of the study group under defined criteria." *Id.* (citing REFERENCE MANUAL at 341, 364, 371). A case series, on the other hand, is simply a report describing the incidences and circumstances of a particular disease in patients, and need not involve a control group or fixed time period. (*See, e.g.*, Dunn Reply, Ex. A at 29-30.)

In his Rule 26 report, Dr. Dunn conducts his statistical analysis by examining data from three published, peer-reviewed case series known as the Anderson, Rapley, and Hansen/Beck studies. (Dunn Mot., Ex. 1 at 4-7.) Dr. Dunn also relies on unpublished data from a study by Wiater/Matsen. (*Id.* at 6-7.) In their Response, Plaintiffs state that "Dr. Dunn will not offer any opinions in this litigation on his evaluation that includes the Wiater/Matsen data" until the study that includes those data is peer-reviewed and published. (Dunn Resp. at 3 n.1.) The Court therefore evaluates the reliability of Dr. Dunn's anticipated testimony without considering the Wiater/Matsen data.

To calculate the statistical association between intra-articular injection of anesthetic by pain pump and chondrolysis, Dr. Dunn pooled the data from just two case series, the Hansen/Beck and Anderson case series.[5] While Dr. Dunn himself admits that pooling cannot typically be done on the data from case series, he concluded that the Anderson and Hansen/Beck series were actually retrospective cohort studies because they included

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[5] Dr. Dunn states that he did not include the data from the Rapley Level III retrospective comparative study because that study's "unexposed" group was not identical to the "unexposed" groups in the Hansen/Beck and Anderson studies. (*See* Dunn Resp. at 3; Dunn Reply, Ex. A at 76.)

"unexposed," or control, groups. (Dunn Reply, Ex. A at 32-35, 154.) Dr. Dunn thus felt he could pool the data to calculate a statistical correlation. (*Id.* at 154.) With regard to the level of scientific evidence, Dr. Dunn explains, "You could call it whatever you'd like, but the data are what they are. There is a control group and a denominator." (*Id.* at 29.)

Both the Anderson and Hansen/Beck reports identify themselves as Level IV case series. Dr. Beck himself testified that a Level IV case series such as his "is clinical evidence[;] it is not any type of prospective matched series or any kind of attempt to make a statement under certain criteria. It's basically a clinical series paper, and that's where it fits into the level of evidence." (Dunn Mot., Ex. 3 at 445.) Even if the Anderson and Hansen/Beck case series included data on groups of "unexposed" patients, the groups were not designed under defined criteria such that the data from the series would rise to a Level II scientific weight. *See McClellan*, 710 F. Supp. 2d at 1108 ("It is undisputed that Dr. Beck did not design the Hansen/Beck Study as a Level II retrospective cohort and did not account for selection bias or confounding factors. . . . Rather, Dr. Beck reported on the occurrences of chondrolysis in his patients and presented them for the review." (internal quotation omitted)). In his report, Dr. Dunn does not attempt to design such groups with the data, nor does he sufficiently address the reliability concerns with the data before using them to calculate a statistical association. Moreover, Dr. Dunn himself admits that at least one peer review of his report, by Dr. Hennekens, observes that the Hansen/Beck study Dr. Dunn relied on "is not a retrospective cohort study" and that there could have been unaccounted for selection bias in the study. (Dunn Reply, Ex. A at 76-80.) Plaintiffs have not met their burden of showing that Dr. Dunn's methodology passes Rule 702 muster. *See McClellan*, 710 F. Supp. 2d at 1108. Because Dr. Dunn's conclusions rest on an improper methodology for calculating the statistical likelihood of an association between the intra-articular infusion of anesthetics in the shoulder and chondrolysis, the Court must exclude Dr. Dunn's testimony.

E. Dr. Charles Beck, Relied Upon by General Causation Experts

Although Plaintiffs did not designate Dr. Beck as a general causation expert, (*see* Gen. Causation Resp. at 6), I-Flow moves to exclude his testimony on Rule 702 grounds, (Beck Mot. at 1). Plaintiffs respond to I-Flow's arguments "because all of [Plaintiffs'] experts rely on Dr. Beck's retrospective study as part of the foundation for their causation opinions." (Beck Resp. at 2.) Because Dr. Beck is not a disclosed general causation expert, the Court denies I-Flow's Motion to Exclude Dr. Beck under Rule 702.

The proper analysis here is under Federal Rule of Evidence 703.[6] Rule 703 provides that, if facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts of data need not be admissible in evidence in order for the opinion or inference to be admitted." I-Flow does not contend that Dr. Beck's work is not of a type reasonably relied upon by experts in the medical field, but rather that, as a Level IV case series, it supports only a finding of an association between the intra-articular infusion of anesthetics and chondrolysis, not causation. (Beck Reply at 4.) In addressing a very similar factual scenario, the Ninth Circuit Court of Appeals stated:

> [T]he fact that a study is associational–rather than an epidemiological study intended to show causation–does not bar it from being used to inform an expert's opinion about the dangers of asbestos releases, assuming the study is "of the type typically relied upon" by experts in the field. Fed. R. Evid. 703. Of course, the expert's opinion testimony must satisfy the requirements of Rule 702–but that requires consideration of the *overall* sufficiency of the underlying facts and data, and the reliability of the methods, as well as the fit of the methods to the facts of the case. Fed. R. Evid. 702. . . . The study's failure to establish causation goes to the weight it should be accorded, but does not mean that an expert could not rely on it in forming an opinion.

W.R. Grace, 504 F.3d at 765, *accord McClellan*, 710 F. Supp. 2d at 1108 ("I find it questionable whether the Hansen/Beck Study constitutes helpful or relevant epidemiological evidence to support an opinion of general causation between continuous infusion and chondrolysis," but "the lack of epidemiological evidence is not fatal to the admission of plaintiffs' experts' testimony, particularly in a case where no epidemiology 'rules out'

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[6] I-Flow does not cite Rule 703 in either its Motion to Exclude Dr. Beck or its Reply.

continuous infusion as a cause for chondrolysis." (citations omitted)). Plaintiffs have demonstrated to the Court that it was proper for the disclosed general causation witnesses to consider Dr. Beck's study.

F. Dr. Suzanne Parisian, FDA Regulatory and Labeling Expert

Plaintiffs have disclosed Dr. Parisian as an FDA regulatory and labeling expert. (Parisian Resp. at 1.) I-Flow asks the Court to exclude Dr. Parisian's extensive anticipated testimony in its entirety, because, under Rule 702, she is not qualified to testify as an expert on FDA regulations and guidelines and her opinions are unreliable and unhelpful. (Parisian Mot. at 1-2.) Dr. Parisian has been disclosed as an expert in numerous lawsuits prior to the instant ones, and many courts have had the opportunity to review her qualifications and the reliability and helpfulness of her opinions. (*Id.* at 2.) Indeed, the parties cite at least 14 decisions from different courts in which Dr. Parisian has been evaluated as an expert, which the Court has reviewed.

By virtue of her experience as an officer at the FDA, the Court first finds that Dr. Parisian is qualified to offer opinions with respect to FDA regulations and labeling. The Court is in agreement that Dr. Parisian is qualified

> insofar as she seeks to testify concerning the matters which [Plaintiffs have] identified as the subject of her testimony, i.e., regulations governing the approval, labeling, advertising and marketing of pharmaceutical and medical products; the process by which the FDA determines the efficacy and safety of new drugs and new drug applications; the issues the FDA considers in the development of product labeling and marketing information; and a manufacturer's responsibility within this system. It is clear, however, . . . that Dr. Parisian seeks to offer testimony and opinions on matters that go well beyond FDA procedures and regulations and her areas of expertise.

Reece v. Astrazeneca Pharm., LP, 500 F. Supp. 2d 736, 744 (S.D. Ohio 2007). In other words, Dr. Parisian may be qualified to testify as to FDA regulations and labeling, but the Rule 702 inquiry does not end there.

The Court has reviewed Dr. Parisian's 209-page Rule 26 report for the above-captioned cases, which includes 10 overarching opinions. (*See* Case No. CV 08-1063-PHX-SRB, Doc. 247, Decl. of Leslie W. O'Leary in Supp. of Pl.'s Resp. in Opp'n to Def. I-Flow's

Mot. to Exclude Pl.'s Expert Dr. Suzanne Parisian, Ex. 1 ("Parisian Report") at 12-14.)[7] I-Flow argues to exclude Dr. Parisian on an opinion-by-opinion basis. (Parisian Mot. at 3-6.) The Court intended to follow the same structure in evaluating the Rule 702 admissibility of Dr. Parisian's anticipated testimony but finds that the same problems exist for each of Dr. Parisian's proffered opinions.

For example, Dr. Parisian first opines that I-Flow and other Defendants "disregarded their duties and obligations to protect public safety and ensure compliance with regulatory safeguards" of the FDA by failing to "adequately design, test and obtain appropriate premarketing clearance from [the] FDA to begin marketing its infusion pain pump legally for a new and unapproved indication. Such negligent actions directly contributed to the pain, suffering and permanent injuries of patients." (Parisian Report at 13.) I-Flow objects to this opinion because it fails to satisfy Rule 702, improperly expresses legal conclusions, and lacks foundation and improperly opines as to the state of mind of I-Flow and whether I-Flow's actions contributed to Plaintiffs' injuries. (Parisian Mot. at 3.) The Court agrees in all respects.

Under Rule 26, an expert's written report must include an explanation of the basis and reasons for each expressed opinion. Fed. R. Civ. P. 26(a)(2)(B)(i). Dr. Parisian's report is a labyrinth that the Court cannot navigate. Under the heading "Bases for Opinions #1 - #3," for example, Dr. Parisian spends 37 pages citing FDA regulations and guidelines but offers no analysis whatsoever to support her opinions. (Parisian Report at 14-51.) Courts have observed this issue with Dr. Parisian's reports in other cases. *See, e.g., In re Trasylol Prods. Liab. Litig.*, 709 F. Supp. 2d 1323, 1346, 1349 (S.D. Fla. 2010) (noting that "Dr. Parisian does not analyze the facts; she, in the words of the *Prempro* court, regurgitates them and reaches conclusory opinions that are purportedly based on these facts," and that, "[d]espite the heading, the section in no way provides an adequate basis for the opinions it is intended to support"). In other sections, Dr. Parisian's report simply presents a narrative of selected

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[7] Dr. Parisian's 10 opinions are numbered 1-2 and 4-11. (*See id.*)

regulatory and corporate events and quotations and then leaps to a conclusion without sufficient explanation. (*See* Parisian Report at 78-103 (presenting a narrative of facts with regard to I-Flow and the FDA that purportedly support Opinions 4 through 7, although no analysis is provided).) This deficiency has also been noted by other courts in excluding such testimony from Dr. Parisian. *See, e.g., id.* at 1347 (citing *Gen .Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."); *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009) (holding that Dr. Parisian "will not be permitted to merely read, selectively quote from, or 'regurgitate' the evidence" (citing *In re Prempro Prods. Liab. Litig.*, 554 F. Supp. 2d 871, 880, 886 (E.D. Ark. 2008) (overturning a punitive damages award based on Dr. Parisian's testimony in part because "she did not explain the documents, provide summaries, or tie them in to her proposed regulatory testimony" and "did not provide analysis, opinion, or expertise")))). As a result, none of Dr. Parisian's anticipated testimony is either helpful or reliable under Rule 702.

Dr. Parisian's report lacks reliability and helpfulness to the jury in other ways as well. In many instances, Dr. Parisian opines as to the knowledge, state of mind, intent or motivations of I-Flow, other Defendants or the FDA itself. (*See* Parisian Mot. at 3-6, 14-15.) For example, Dr. Parisian concludes that, "[b]esides promoting their own pumps in violation of FDA regulations, [Defendants] engaged in conduct intended to misbrand the other manufacturers' products."[8] (Parisian Report at 10.) Dr. Parisian has no knowledge of the state of mind, intent or motivations of Defendants or the FDA, and such testimony is improper under Rule 702 as well as Federal Rules of Evidence 104 and 403. Myriad other courts have observed and excluded this type of testimony in Dr. Parisian's reports in the past.

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[8] Dr. Parisian's report is replete with such statements, so the Court does not endeavor to list them all here.

Trasylol, 709 F. Supp. 2d at 1338, 1346; *In re Gadolinium-Based Contrast Agents Prods. Liab. Litig.*, No. 1:08 GD 50000, MDL No. 1909, 2010 WL 1796334, at *13 (N.D. Ohio May 4, 2010); *Fosamax*, 645 F. Supp. 2d at 192; *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, Civil Nos. 06-25 (DWF/AJB), 05-2596 (DWF/AJB), MDL No. 05-1708 (DWF/AJB), 2007 WL 1964337, at *8 (D. Minn. June 29, 2007).

I-Flow also contends, and the Court agrees, that many of Dr. Parisian's opinions are beyond her expertise, speculative or too conclusory. (*See* Parisian Mot. at 3-6, 16-17.) For example, Dr. Parisian concludes that Defendants "failed to voluntarily and adequately warn health care providers, sales representatives, distributors and patients," but Dr. Parisian is not qualified to offer such an opinion. *See Fosamax*, 645 F. Supp. 2d at 191-92; *Guidant*, 2007 WL 1964337, at *7.

Because the proffered report does not allow the Court to glean any admissible opinions, Plaintiffs have failed to meet their burden of demonstrating the admissibility of any of Dr. Parisian's anticipated testimony under Rule 702. The Court therefore excludes Dr. Parisian's anticipated testimony in its entirety. *See Trasylol*, 709 F. Supp. 2d at 1350.

IT IS THEREFORE ORDERED denying the following motions filed by Defendant I-Flow Corporation:

- Case No. CV 08-1063-PHX-SRB, Docs. 239 (Badylak), 240 (General Causation);
- Case No. CV 08-1064-PHX-SRB, Docs. 183 (Badylak), 186 (Beck), 187 (General Causation);
- Case No. CV 08-1859-PHX-SRB, Docs. 109 (Badylak), 112 (General Causation);
- Case No. CV 09-0040-PHX-SRB, Docs. 145 (Badylak), 146 (Bailie), 150 (Shafer), 152 (General Causation);
- Case No. CV 09-0042-PHX-SRB, Docs. 128 (Badylak), 129 (Bailie), 132 (Shafer), 133 (General Causation); and
- Case No. CV 09-0044-PHX-SRB, Docs. 139 (Badylak), 143 (Shafer), 145 (General Causation), 147 (Bailie).

IT IS FURTHER ORDERED granting the following motions filed by Defendant I-Flow Corporation:

- Case No. CV 08-1063-PHX-SRB, Doc. 237 (Parisian);
- Case No. CV 08-1064-PHX-SRB, Doc. 184 (Parisian);
- Case No. CV 08-1859-PHX-SRB, Doc. 110 (Parisian);
- Case No. CV 09-0040-PHX-SRB, Docs. 149 (Parisian), 154 (Dunn);
- Case No. CV 09-0042-PHX-SRB, Docs. 131 (Parisian), 137 (Dunn); and
- Case No. CV 09-0044-PHX-SRB, Docs. 144 (Parisian), 148 (Dunn).

IT IS FURTHER ORDERED that the Rule 702 admissibility decisions contained herein apply to all of the above-captioned cases.

DATED this 26th day of January, 2011.

Susan R. Bolton
United States District Judge